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No. .....

In The

Supreme Court of the United States

October Term, 1982

KEARNEY & TRECKER CORPORATION,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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December 29, 1982

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED

Is a partial, temporary taking of control over a manufacturer's facility a taking under the Fifth Amendment?

Did the Directive issued to Kearney & Trecker Corporation by the United States Department of Commerce, Office of Industrial Mobilization, to change its production schedule, which change delayed deliveries to customers of Kearney & Trecker Corporation, and which delays resulted in a cancelled order, constitute a compensable partial taking of Kearney & Trecker Corporation's property?

PARTIES

The parties to the proceedings in the United States Court of Claims, the judgment of which is sought to be reviewed, are all listed in the caption of this case in this Court. Kearney & Trecker Corporation is a wholly owned subsidiary of Cross & Trecker Corporation.

TABLE OF CONTENTS

Pages

Questions Presented i

Parties i

Table of Authorities ii

Opinion Below 1

Jurisdiction of This Court 2

Constitutional Provisions, Statutes, and Regulations Involved 2

Statement of the Case 2

Reasons for Granting the Writ 4

Conclusion 13

Appendix:

Opinion and judgment of the United States Court of Claims in *Kearney & Trecker Corporation v. the United States*, — Ct. Cl. —, 688 F. 2d 780 (1982), of September 8, 1982 ..... App. 1

Order of the United States Court of Claims in *Kearney & Trecker Corporation v. The United States*, — Ct. Cl. —, — F. 2d —, No. 477-81C (1982) of September 30, 1982 ..... App. 10

Constitution Provisions: ..... App. 11

Statutes: ..... App. 12

Regulations: ..... App. 22

TABLE OF AUTHORITIES

Pages

CASES

Eyherabide v. United States, 345 F. 2d 565 (Ct. Cl. 1965) 9

Kearney & Trecker Corporation v. The United States, — Ct. Cl. —, 688 F. 2d 780 (1982) 1

Kimball Laundry Company v. United States, 338 U. S. 1 (1949) 8

Omnia Corp. v. United States, 261 U. S. 502 ..... 7, 8

Penn Central Transportation Co. v. City of New York, 438 U. S. 104 (1978) 6

United States v. Caltex, 344 U. S. 143 (1952) 12

United States v. General Motors Corp., 323 U. S. 373 (1945) 9

STATUTES

28 U. S. C. § 1491 4

28 U. S. C. 1255 (1) 2

Defense Production Act of 1950, 50 U. S. C. App. § 2061, *et seq.* 2, 3, 4, 10, 12

TEXTS

Keeping Defense Programs on Schedule, Defense Materials System and Defense Priorities System 10

TABLE OF AUTHORITIES—Continued

Pages

MISCELLANEOUS

DPS Reg. 1, 32A C. F. R. Part 651 (1980) 2

United States Constitution Amendment V 2, 4, 5, 6, 9, 13

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KEARNEY & TRECKER CORPORATION,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

OPINION BELOW

The opinion and judgment of the Court of Claims, *Kearney & Trecker Corporation v. The United States,* — Ct. Cl. —, 688 F. 2d 780 (1982) and the order of the Court of Claims denying Kearney & Trecker Corporation's motion to alter or amend judgment, *Kearney & Trecker Corporation v. The United States,* — Ct. Cl. —, — F. 2d —, Case No. 477-81C (1982), appear in the Appendix to this petition.

JURISDICTION OF THIS COURT

The opinion and judgment of the United States Court of Claims which granted the United States' motion for summary judgment in this case was rendered and entered on September 8, 1982. The order of the United States Court of Claims denying Kearney & Trecker Corporation's motion to alter or amend judgment was entered on September 30, 1982. This petition for writ of certiorari is filed within 90 days of that order. The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

United States Constitution Amendment V: See App. 11.

Defense Production Act of 1950, 50 U. S. C. App. § 2061 *et seq.*: See App. 12.

DPS Reg. 1, 32A C. F. R. Part 651 (1980): See App. 22.

STATEMENT OF THE CASE

This is a claim for just compensation under the Fifth Amendment to the United States Constitution for a taking by the Department of Commerce, on behalf of the Air Force, of the property of the Petitioner by appropriation of the Plaintiff's production facilities by a delivery Directive which resulted in the absolute loss of a sale previously made to Rolls Royce, Ltd.

Petitioner is a manufacturer of heavy industrial production machinery. On November 22, 1979 Rolls Royce,

Ltd. ordered a sophisticated and complex piece of industrial machinery from Petitioner, who accepted the order and scheduled delivery for January, 1981. This delivery date was rescheduled to September, 1981 due to a labor strike at Kearney & Trecker Corporation's plant. The fixed price for the machine, known as a Five Axis Modu-Line Traveling Column Machining Center, was $682,480.00.

Lockheed-California Company ordered a Five Axis Modu-Line Traveling Column Machining Center from Petitioner on December 21, 1979. This order was accepted by Petitioner, and delivery was ultimately scheduled for November, 1981. The fixed price for this machine was $656,080.00.

On November 6, 1980 the Department of Commerce, International Trade Administration, Office of Industrial Mobilization, ordered Petitioner to ship the machine ordered by Lockheed by June 30, 1981. This order was in the form of a directive issued pursuant to the provisions of the Defense Production Act of 1950, 50 U. S. C. App. 2061, *et seq.*, and the regulations promulgated pursuant thereto.

Petitioner advised the Office of Industrial Mobilization that it could produce only two such machines per month, and that compliance with the Directive would necessitate providing Lockheed with a machine being produced for another of Petitioner's customers.

Petitioner proceeded to comply with the Directive, and moved the order for the Lockheed machine to the production position previously held by Rolls Royce, Ltd. Petitioner was thereby unable to deliver to Rolls Royce as scheduled, and Rolls Royce cancelled its order.

Petitioner filed its claim for just compensation under the Fifth Amendment in the United States Court of Claims under 28 U. S. C. § 1491, seeking compensation for its right to use and control its property, which the Government appropriated when it issued its Directive. The measure of damages is Petitioner's reasonable incremental profit expectations wholly and irretrievably lost when Rolls Royce, Ltd. cancelled. The Government entered a general denial, and moved for summary judgment.

The Court of Claims held that the loss was incidental to the governmental action, and the Government was not required under the Fifth Amendment to pay for losses incidentally suffered as a result of directives issued pursuant to the Defense Production Act, or for frustration of contract expectations. It then granted the Government's motion for summary judgment.

On September 30, 1982, the Court of Claims denied Petitioner's motion to alter or amend the judgment.

REASONS FOR GRANTING THE WRIT

The Court should grant a writ of certiorari in this case for two reasons, both of which are of national interest: First, this is a case of first impression involving just compensation under the Fifth Amendment that has been incorrectly decided by the Court of Claims. Second, the decision of the Court of Claims affects countless manufacturers and businesses which are required to comply with the requirements of the Defense Production Act of 1950, 50 U. S. C. App. § 2061 *et seq.*

1. The first sentence of the opinion of the Court of Claims begins, "In this case of first impression, . . ." (App. 1). The opinion then improperly extends existing law to the facts of this case, and concludes that Kearney & Trecker Corporation is not entitled to compensation under the Fifth Amendment.

Petitioner has never contended it was not paid the contract price for the Modu-Line it manufactured, sold and delivered to Lockheed. Rather, Petitioner has maintained from the inception of this case that it has not received compensation from the United States for losses which would not have been suffered but for the Governmental Directive.

The Court of Claims is correct when it states in its opinion that Kearney & Trecker Corporation negotiated the purchase price for the Modu-Line with Lockheed prior to the commencement of the machine's production and before the taking occurred. The opinion below is incorrect when it states Petitioner's contract with Lockheed was "cost plus a fixed fee" (App. 2, 5), and it is misleading when it says, "In the circumstances, the negotiated price constitutes just compensation for the Modu-Line itself." (App. 6)

At the time Petitioner and Lockheed entered into the contract for the Modu-Line, the delivery date was December 15, 1981, and the price was specifically set at $656,080.00. This delivery date was confirmed only after petitioner determined its production schedule for other customers. When the Office of Industrial Mobilization directed Petitioner to accelerate the delivery of the Modu-Line for Lockheed, it required Kearney & Trecker Cor-

poration to award Rolls Royce's production position to Lockheed.

Petitioner's contract with Rolls Royce obligated it to manufacture and deliver a Modu-Line to Rolls Royce by September, 1981. By entering into this contract, Petitioner acquired the right to produce and deliver a Modu-Line by a date certain, and to realize a profit on this sale.

The Directive issued seized Petitioner's rights to use its property in its business without confiscatory interference by governmental action with its contract with Rolls Royce.

This concept was discussed by the Court in *Penn Central Transportation Co. v. City of New York,* 438 U. S. 104, 124 (1978), and was referred to as the Government's interference with "investment backed expectations."

In discussing when the Government's actions require just compensation under the Fifth Amendment, this Court noted:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant, and particularly, the extent to which the regulation has interfered with distinct investment backed expectations are, of course, relevant considerations. *Id.*

The Directive, without question, seized petitioner's rights, its investment backed "production facilities" and expectations, with the damages measured by the lost contract it had with Rolls Royce. The Fifth Amendment to the Constitution compels the government to provide just compensation for this taking.

The Court of Claims relied on *Omnia Corp. v. United States,* 261 U. S. 502, in determining that the Directive did not affect a taking of Petitioner's property. This reliance is misplaced. In *Omnia, supra,* the plaintiff had a contract with a steel manufacturer to purchase a large supply of steel. The government requisitioned one full year's production of steel from the steel manufacturer prior to delivery to the plaintiff. Omnia, which was a customer of the appropriated plant, brought suit seeking compensation for the taking of its contract. The Court held this was not a compensable taking of *Omnia's* contract since this was a "consequential loss," *Omnia, supra,* 261 U. S. at 510, and "It [contract] was not appropriated, but ended." *Id* at 511.

The Court of Claims failed to distinguish that the plaintiff in *Omnia, supra,* was not directly subjected to the Governmental action, whereas the Petitioner in this case was the one upon which the impact directly fell. In seeming to follow *Omnia, supra,* the Court of Claims states, "The government did not appropriate any of the rights the plaintiff had under the contract [with Rolls Royce] but only made it impossible for the plaintiff to perform it." (App. 8). Therein not only lies the difference between this case and *Omnia* but also brings into sharp focus the court's error. One of Petitioner's basic rights as manufacturer was to use its plant and equipment to fulfill its contracts and use the incremental profit therefrom. This investment backed expectation is essential to each of Petitioner's contracts. The appropriation of the production facilities with the concomitant right to fulfill its business purpose is not "consequential", but rather is itself the taking.

The Court of Claims' position that the loss by Petitioner is "consequential" as in *Omnia,* and therefore not compensable, is at odds with the facts and previous authority. The term "consequential damage" is not a term of art in constitutional law, and was not defined by the Court of Claims in its opinion.

This Court has previously provided compensation for damages resulting from the Government's taking, including compensation for damages which could have easily been termed consequential. In *Kimball Laundry Company v. United States,* 338 U. S. 1 (1949), the Government temporarily took occupancy of plaintiff's laundry plant and paid the plaintiff compensation for the value of the building and its equipment over the term of the occupancy. On writ of certiorari to the United States Court of Appeals for the Eighth Circuit, this Court held that Kimball Laundry was entitled in addition to be reimbursed for the trade routes it had lost as a result of the Government's taking of the physical laundry plant. The compensable taking of Kimball Laundry's trade routes is analogous to the Government's appropriation of Petitioner's production schedule and the contractual rights which would have been enjoyed but for the dominion exercised by the Government.

Kimball's physical plant was taken and compensation was paid. In *Kimball, supra,* this Court found that an incorporeal right was also taken, trade routes that involved third parties. The taking of these trade routes was a *consequence* of the physical taking of the plant, yet they were so integral with the actual physical laundry plant that compensation was awarded. Here, payment has been made for the physical machine, the Modu-Line, but

an integral part of this physical taking is a production position and contractual rights Petitioner had with its customers, one of whom was Rolls Royce. The taking of these incorporeal property rights was not an incidental occurrence of the Directive. Once the Directive was issued no other result could occur but that the production portion and rights of Petitioner with Rolls Royce would be taken. But for the act of the Government the plaintiff would have sold two machining centers instead of one. *Kimball, supra,* applies to this case, and accordingly Petitioner should be compensated for the taking.

This direct taking for which the Petitioner seeks to be compensated may not be quite as obvious as other direct takings where the taking is of all facilities. However, it is not the form of the taking that determines if it is compensable under the Fifth Amendment, but the substance. To constitute a taking under the Fifth Amendment it is not necessary that property be absolutely "taken" in the narrow sense of that word to come within the protection of this constitutional provision. It is sufficient if the action by the government involves a direct interference with or disturbance of property rights. See *Eyherabide v. United States,* 345 F. 2d 565 (Ct. Cl. 1965).

For example, it has been stated by this Court, it is,

> "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign (which) constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter to amount to a taking." *United States v. General Motors Corp.,* 323 U. S. 373, 378 (1945)

2. The decision by the Court of Claims in this action affects not only the petitioner and the Office of Industrial Mobilization. It affects every manufacturer which the government orders to utilize its property to comply with its orders or Directives under Defense Production Act of 1950, *supra*.

There can be no doubt that the legal question, considered by the Court of Claims to be one of first impression, is before this Court in a factual context of considerable importance.

In its pamphlet entitled *Keeping Defense Programs on Schedule, Defense Materials System and Defense Priorities System* (December, 1976), the Department of Commerce expressed well the scope and significance of the defense priorities system:

> Although the Nation is at relative peace, the issue of preparedness for national defense emergencies still looms as an important factor in the shaping of our national policies. The international setting still dictates that a major effort be made to insure our national security and to lend credibility to our foreign policy initiatives. The very size and scope of our defense program dramatically reflects this concern.
>
> Almost all Americans are familiar with foreign military aid programs, the large number of military bases placed strategically around the world, space and atomic energy projects, and the international alliances such as NATO; but not all Americans are familiar with other Governmental endeavors which, though less well known, contribute significantly to the security of the United States. Two of these lesser-known operations are the Defense Priorities System and the Defense Materials System.
>
> The Defense Priorities System (DPS) and the Defense Materials System (DMS) are bodies of Govern-

ment regulations and orders promulgated under the authority of the Defense Production Act of 1950 (DPA) as amended, designed to accomplish two main purposes. First, the systems help to insure that defense programs are maintained on schedule by providing priority treatment for the purchase of products and materials by defense agencies, contractors, subcontractors and their suppliers. This is accomplished by directing the flow of materials and products to the Nation's military, atomic energy, and space, production or construction programs. These programs are referred to hereinafter as "defense programs". Second, the operation of the systems results in the maintenance of an administrative means by which the total economic resources of the country could be mobilized should the need arise.

Despite the relatively easy supply situation which exists today with respect to most materials, the usefulness of the systems is not diminishing. On the contrary, the priority treatment currently provided under DPS and DMS insures a timely flow of materials and components to programs which are vital to our national security. Examples of such programs readily come to mind: Aircraft, nuclear and other energy developments, missiles, and the equipment needed to maintain the combat readiness of the military forces are all of obvious importance to our national security. Other less obvious programs which are important to the security of our Nation also operate under the systems; the Trans-Alaska pipeline to mention but one.

Recognizing the tremendous importance of these programs as well as considering the enormous sums appropriated for defense, *the operation of the systems represents a very small premium we are paying for substantial insurance coverage.* Even in times of generally ample supply, certain materials and components can become relatively scarce for various reasons. In some cases unusual specifications create design problems as well as supply difficulties. Supply situa-

> tions may change overnight as a result of strikes or unforeseeable international incidents. Economic fluctuations may also affect the availability of materials needed for defense programs. [The operations of the Defense Materials System and the Defense Priorities System mitigate the adverse impact of these various industrial economic factors on defense programs.]
>
> A strong and ready industry is as much a part of our national defense as is a competent military organization. Industry's contribution to our national security is immeasurable. It must be our common purpose to maintain, in peacetime, a defense posture of sufficient strength and credibility to deter aggression and to have at hand the means for mobilizing should the need arise. (Emphasis added.)

The issue which must be squarely faced by this Court is whether that insurance premium is to be paid only by the specific manufacturer affected by a given priorities directive, or whether that burden is more appropriately shared by the public at large.

The late Justice William O. Douglas of this Court stated the principle well in his dissenting opinion in *United States v. Caltex*, 344 U. S. 143, 156 (1952):

> It seems to me that the guiding principle should be this: Wherever the government determines that one person's property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse, rather than the individual, should bear the loss.

The effect of the decision below is that the government is immune from liability under the Fifth Amendment when it issues orders or directives under the authority of the *Defense Production Act of 1950*, and thereby confiscates property and contractual rights from manufacturers. This extraordinary result is visibly at odds with the basic

philosophy of the Fifth Amendment to the Constitution. Resolution of this vital case should not be left to a lower court, which is the only court likely to consider the question in view of the Court of Claims jurisdiction over the Fifth Amendment claims in excess of $10,000.00. This issue needs to be resolved now by this Court.

CONCLUSION

For all of the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 477-81C

(Decided September 8, 1982)

KEARNEY & TRECKER CORPORATION
v. THE UNITED STATES

Malcolm D. Young, attorney of record, for plaintiff. *Young & White*, of counsel.

Colvin W. Grannum, with whom was *Assistant Attorney General J. Paul McGrath*, for defendant. *Cecil Hunt*, *Pamela P. Breed*, and *Daniel C. Hurley, Jr.*, Department of Commerce, of counsel.

Before FRIEDMAN, *Chief Judge*, DAVIS and BENNETT, *Judges*.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

FRIEDMAN, *Chief Judge*, delivered the opinion of the court:

In this case of first impression, the plaintiff seeks just compensation under the fifth amendment for the alleged taking of its property that occurred when, as a result of the government's requiring the plaintiff to expedite delivery of a machine it was manufacturing for a government contractor, the plaintiff lost a sale of a similar machine under a contract with a private contractor. The plaintiff seeks the damages it suffered on the aborted second sale, apparently consisting of its expenses and lost

profits. The government has moved for summary judgment, which we grant on the ground that the plaintiff has not stated a valid claim for a compensable fifth amendment taking.

I.

In late 1979, the plaintiff entered into contracts with Rolls Royce, Ltd., and Lockheed-California ("Lockheed") to manufacture for, and to sell to, each of them a complicated machining device called a "Moduline." The delivery date for the Rolls Royce Moduline was January 1981, and the purchase price was $682,480. The delivery date for the Lockheed Moduline was December 15, 1981, and the contract price was cost plus a fixed fee. Lockheed ordered its Moduline for use in a classified Air Force project.

In the second half of 1980, the Air Force decided that its requirements necessitated that Lockheed's production schedule be accelerated. This in turn required that Lockheed obtain its Moduline in June 1981. Acceleration of the Moduline delivery date was to be accomplished through the Defense Production Act of 1950, as amended, Pub. L. No. 81-774, 64 Stat. 798, codified at 50 U. S. C. App. §§ 2061 *et seq.* (1976 & Supp. IV 1980) (the "Act").

The Act authorizes the President "to require that performance under contracts or orders . . . which he deems necessary . . . to promote the national defense shall take priority over performance under any other contract or order." 50 U. S. C. App. § 2071 (a). The President has delegated this authority to the Secretary of Commerce, who in turn has delegated it to the Office of Industrial Management (the "Office"). The means by which the Office exercises this authority is the rating of contracts

or orders. There are three categories of ratings, each of which gives the contract or order priority over unrated contracts or orders. One of the three ratings, called a directive, takes priority over the other two ratings and was issued in this case. The plaintiff does not contend that it was unaware when it accepted the Lockheed order in 1979 that the government could expedite delivery under the Act.

When the plaintiff was informed that the Air Force was considering the rating of the Lockheed Moduline to expedite its delivery, the plaintiff told the government that that action would delay the delivery of several Modulines to commercial customers with unrated purchase orders.

Because Modulines were "made to order," generally took two years to produce, and came off the assembly line at a rate of only two per month, the plaintiff could not expedite production of the Moduline originally designated for Lockheed to meet the June delivery date. Instead, the plaintiff would have to supply Lockheed with a different Moduline that was being manufactured for some customer with a lower priority but an earlier delivery date and that could be modified by June 1981 to meet Lockheed's specifications. Consequently, the delivery date for the commercial customer whose Moduline was delivered to Lockheed would be delayed—perhaps until the Moduline originally scheduled for Lockheed could be completed.

Two factors would increase further the delay for the commercial customer preempted by the rating of the Lockheed contract. First, a three-months' strike in the second half of 1980 shut down the plaintiff's assembly line and so delayed its overall delivery schedule. Second, the plain-

tiff had several governmentally rated orders for Modulines other than the Lockheed order. These orders would have to be given priority in any rearrangement of the plaintiff's delivery schedule (that is, efforts first would have to be made to minimize the delay on these rated orders before the needs of the commercial customers could be met).

After considering the plaintiff's concerns, the Office on November 6, 1980, telexed a directive to the plaintiff ordering that the Moduline be delivered to Lockheed by June 30, 1981.

On November 12, 1980, the plaintiff accepted the directive. The plaintiff, however, informed the Office that the new Lockheed delivery date would result "in a five month delay beyond our three month strike delay for one of our commercial customers." Rolls Royce was the unlucky commercial customer. Because of the delay, Rolls Royce notified the plaintiff in late January 1981 that it was cancelling its order.

The plaintiff informed the Office in February 1981 of the Rolls Royce cancellation and stated that it would look "to the government . . . for the reimbursement for all financial loss and damages occasioned by the preemption of our products by the utilization of these priorities." Subsequently, the plaintiff calculated the total loss at $434,596, the amount for which it now sues.

The plaintiff's petition contends that the issuance of the directive constituted a taking of the plaintiff's property, for which the fifth amendment of the Constitution requires the government to pay just compensation. The plaintiff argues the government "took both [the plaintiff's]

contract with Rolls Royce and the Modu-Line" delivered to Lockheed.

II.

A. The government argues that its directive that the plaintiff expedite the delivery of the Moduline to Lockheed did not constitute a taking. Assuming without deciding, however, that it was a taking, the plaintiff still cannot recover.

The only property of the plaintiff that the directive "took" was the Moduline intended for Rolls Royce but diverted to Lockheed. The plaintiff received for that Moduline the same compensation for which it had agreed to deliver a Moduline to Lockheed, i. e., cost plus a fixed fee. We cannot say that this amount did not constitute just compensation for the Moduline.

Just compensation for property the government has taken ordinarily is determined by the fair market value of the property. *Kimball Laundry Co. v. United States*, 338 U. S. 1, 5-6 (1949); *United States ex rel. TVA v. Powelson*, 319 U. S. 266, 275 (1943); *United States v. Miller*, 317 U. S. 369, 374-75 (1943). *See generally* 4 NICHOLS' THE LAW OF EMINENT DOMAIN § 12.2 (3d ed. J. Sachman 1981) [hereinafter cited as NICHOLS' EMINENT DOMAIN]. Fair market value provides an objective standard that properly ignores the owner's or condemnor's "unique need for [the] property or idiosyncratic attachment to it." *Kimball Laundry Co.*, 338 U. S. at 5.

In the present case, there is no established market price for Modulines. However, Lockheed and the plaintiff negotiated a price (i. e., cost plus a fixed fee) for the Moduline before the plaintiff began to manufacture it or

the taking occurred. *Cf.* 4 NICHOLS' EMINENT DOMAIN, *supra*, § 12.311 (discussing the relevance for valuation of prior sales of the property or contemporary sales of similar property). The plaintiff does not assert that the price resulted from coercion or was below the market. It does not contend that the Moduline it delivered to Lockheed differed significantly from the one originally ordered by and intended for Lockheed, or that any changes it made in the Moduline being built for Rolls Royce to meet Lockheed's requirements so increased its costs as to make the Lockheed price unfair. In the circumstances, the negotiated price constituted just compensation for the Moduline itself.

The plaintiff, however, argues: "What was appropriated was not just the Modu-Line, but [the plaintiff's] investment backed expectations to produce and deliver a Modu-Line to Rolls Royce at a date certain. [The plaintiff] has not been compensated for this appropriation. . . ." To the extent this contention refers to the plaintiff's inability to perform its contract with Rolls Royce, we deal with that issue below. If, however, the plaintiff is arguing that because of the "idiosyncratic" needs of Rolls Royce, the English manufacturer would have paid more than the market price (i. e., the price Lockheed negotiated) for the particular Moduline delivered to Lockheed, that is not a factor which may be considered in determining just compensation. *See, e. g., Kimball Laundry Co.*, 338 U. S. at 5. The frustration of the plaintiff's "expectations" is not compensable. *E. g., Powelson*, 319 U. S. at 281-82; *see also R. J. Widen Co. v. United States*, 174 Ct. Cl. 1020, 1029, 357 F. 2d 988, 994 (1966); 4 NICHOLS' EMINENT DOMAIN, *supra*, § 12.22[2] at p. 12-111 (it is the

objective value of the property taken, not the loss to the property's owner, that is the measure of compensation).

B. The plaintiff also argues that the directive appropriated its contract with Rolls Royce. The government, however, did not take the contract. Although the directive may have frustrated the plaintiff's performance of the contract, that frustration was an "unintended incident" of the taking of the Moduline, for which the plaintiff is not entitled to receive just compensation under the fifth amendment.

A contract is property within the meaning of the fifth amendment, *e. g., Lynch v. United States*, 292 U. S. 571, 579 (1934), and the government may appropriate a contract with the resulting obligation to pay just compensation, *e. g., Brooks-Scanlon Corp. v. United States*, 265 U. S. 106 (1924). On the other hand, not every exercise of governmental power that interferes with, or frustrates, performance of a contract constitutes a compensable taking. *E. g., Omnia Corp. v. United States*, 261 U. S. 502, 510-11 (1923); *Knox v. Lee*, 79 U. S. (12 Wall.) 457 (1870); *Klein v. United States*, 179 Ct. Cl. 910, 914-16, 375 F. 2d 825, 828-29 (1967), *cert. denied*, 389 U. S. 1037 (1968); 4 NICHOLS' EMINENT DOMAIN, *supra*, § 13.33.

In *Omnia*, the plaintiff had entered into a contract with a steel manufacturer to purchase a large quantity of steel at below market price. Prior to any delivery of steel to Omnia, the government requisitioned the manufacturer's entire production for the year. Omnia sued the government for just compensation, claiming that the government requisition effected a taking of its property, i. e., the contract.

The Court held that the requisition did not effect a compensable taking of Omnia's contract. The Court noted that the taking clause of the fifth amendment covers only direct appropriations of private property and not "consequential loss or injury resulting from lawful governmental action." 261 U. S. at 510. The Court rejected Omnia's argument that the steel plate was so identified with the contract "that the taking of the former, *ipso facto*, took the latter." *Id.* The Court stated: "As a result of this lawful government action [the requisitioning of the steel] the performance of the contract was rendered impossible. It was not appropriated but ended." *Id.* at 511. "[T]he effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the Government. . . . Frustration and appropriation are essentially different things." 261 U. S. at 513.

The principles announced and applied in *Omnia* are equally applicable here, and similarly compel the conclusion that the directive did not effect a taking of the plaintiff's contract with Rolls Royce. The government did not appropriate the contract. The directive that required the plaintiff to expedite delivery of the Moduline to Lockheed merely frustrated the performance of the plaintiff's contract with Rolls Royce. The government did not appropriate any of the rights the plaintiff had under the contract but only made it impossible for the plaintiff to perform it. As in *Omnia*, "the effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the Government." *See also T. O. F. C. v. United States*, Ct. Cl. No. 207-81C, slip op. at 10-11 (decided June 30, 1982).

The fact that in *Omnia* it was the purchaser rather than the manufacturer who sued for a taking, does not provide a basis for distinguishing that case, as the plaintiff seeks to do. The Court focused not upon the effect of the government's action upon the purchaser, but upon the effect of that action upon the manufacturer's ability to perform its contract with the purchaser. *Omnia* makes it clear that the mere frustration of a contract resulting from the government's exercise of its power of eminent domain is not a "taking" for which just compensation must be awarded.

In determining just compensation for the taking of land, the courts have refused to include such items as "expenses incurred in having to readjust manufacturing operations, frustration of contract or business, loss of business, . . . [because they] are deemed non-recoverable consequential damages." *Georgia Pacific Corp. v. United States*, 226 Ct. Cl. —, — n. 44, 640 F. 2d 328, 361 n. 44 (1980); *see also United States v. 7,216.50 Acres of Land*, 507 F. Supp. 228, 235-36 (D. S. C. 1980). Since an owner of property appropriated by the government "is not entitled to compensation for the loss of profits on his contracts (existing and expected) taken as a whole—that is, injury to his business—*a fortiori* he is not entitled to compensation for the loss of expected profits on a single contract." 4 NICHOLS' EMINENT DOMAIN, *supra*, § 13.33 at p. 13-238.

CONCLUSION

The defendant's motion for summary judgment is granted, and the petition is dismissed.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

September 30, 1982

ORDER

PER CURIAM: IT IS ORDERED that the motions of the parties as set forth, for rehearing, reconsideration or other relief under Rules 72(d), 151 and 152 are DENIED:

477-81C Kearney & Trecker Corporation

Plaintiff's motion to alter or amend judgment filed September 27, 1982, of opinion dated September 8, 1982. (FRIEDMAN, *Chief Judge*, DAVIS and BENNETT, *Judges*)

APPENDIX C

UNITED STATES CONSTITUTION AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

TITLE 50, APPENDIX—WAR AND NATIONAL DEFENSE

§ 2061. Short title

This Act [sections 2061 to 2169 of this Appendix], divided into titles, may be cited as "the Defense Production Act of 1950".

(Sept. 8, 1950, ch. 932, § 1, 64 Stat. 798.)

§ 2062. Declaration of policy

In view of the present international situation and in order to provide for the national defense and national security, our mobilization effort continues to require some diversion of certain materials and facilities from civilian use to military and related purposes. It also requires the development of preparedness programs and the expansion of productive capacity and supply beyond the levels needed to meet the civilian demand, in order to reduce the time required for full mobilization in the event of an attack on the United States.

In order to insure productive capacity in the event of such an attack on the United States, it is the policy of the Congress to encourage the geographical dispersal of the industrial facilities of the United States in the interest of the national defense, and to discourage the concentration of such productive facilities within limited geographical areas which are vulnerable to attack by an enemy of the United States. In the construction of any Government-owned industrial facilities, in the rendition of any Government financial assistance for the construction, expansion, or improvement of any industrial facilities, and in the procurement of goods and services, under this or

any other Act, each department and agency of the Executive Branch shall apply, under the coordination of the Office of Defense Mobilization, when practicable and consistent with existing law and the desirability for maintaining a sound economy, the principle of the geographical dispersal of such facilities in the interest of national defense. Nothing contained in this paragraph shall preclude the use of existing industrial facilities.

(Sept. 8, 1950, ch. 932, § 2, 64 Stat. 798; June 30, 1953, ch. 171, § 2, 67 Stat. 129; Aug. 9, 1955, ch. 655, § 2, 69 Stat. 580; June 29, 1956, ch. 474, § 4, 70 Stat. 408.)

* * *

§ 2071. Priority in contracts and orders

(a) Allocation of materials and facilities

The President is hereby authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.

(b) Critical and strategic materials

The powers granted in this section shall not be used to control the general distribution of any material in the

civilian market unless the President finds (1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.

(c) Domestic energy supplies

(1) Notwithstanding any other provision of this Act [sections 2061 to 2169 of this Appendix], the President may, by rule or order, require the allocation of, or the priority performance under contracts or orders (other than contracts of employment) relating to, supplies of materials and equipment in order to maximize domestic energy supplies if he makes the findings required by paragraph (3) of this subsection.

(2) The President shall report to the Congress within sixty days after the date of enactment of this subsection [Dec. 22, 1975] on the manner in which the authority contained in paragraph (1) will be administered. This report shall include the manner in which allocations will be made, the procedure for requests and appeals, the criteria for determining priorities as between competing requests, and the office or agency which will administer such authorities.

(3) The authority granted in this subsection may not be used to require priority performance of contracts or orders, or to control the distribution of any supplies of materials and equipment in the marketplace, unless the President finds that—

(A) such supplies are scarce, critical, and essential to maintain or further (i) exploration, production, refining, transportation, or (ii) the conservation of energy supplies, or (iii) for the construction and maintenance of energy facilities; and

(B) maintenance or furtherance of exploration, production, refining, transportation, or conservation of energy supplies or the construction and maintenance of energy facilities cannot reasonably be accomplished without exercising the authority specified in paragraph (1) of this subsection.

(4) During any period when the authority conferred by this subsection is being exercised, the President shall take such action as may be appropriate to assure that such authority is being exercised in a manner which assures the coordinated administration of such authority with any priorities or allocations established under subsection (a) of this section and in effect during the same period.

(Sept. 8, 1950, ch. 932, title I, § 101, 64 Stat. 799; July 31, 1951, ch. 275, title I, § 101 (a), 65 Stat. 132; June 30, 1952, ch. 530, title I, §§ 101, 102, 66 Stat. 296; June 30, 1953, ch. 171, § 3, 67 Stat. 129; Dec. 22, 1975, Pub. L. 94-163, title I, § 104, 89 Stat. 878.)

* * *

§ 2152. Definitions

As used in this Act [sections 2061 to 2169 of this Appendix]

(a) The word "person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of

the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing: *Provided,* That no punishment provided by this Act [said sections] shall apply to the United States, or to any such government, political subdivision, or government agency.

(b) The word "materials" shall include raw materials, articles, commodities, products, supplies, components, technical information, and processes.

(c) The word "facilities" shall not include farms, churches or other places of worship, or private dwelling houses.

(d) The term "national defense" means programs for military and atomic energy production or construction, military assistance to any foreign nation, stockpiling, space, and directly related activity.

(e) The words "wages, salaries, and other compensation" shall include all forms of remuneration to employees by their employers for personal services, including, but limited to, vacation and holiday payments, night shift and other bonuses, incentive payments, year-end bonuses, employer contributions to or payments of insurance or welfare benefits, employer contributions to a pension fund or annuity, payments in kind, and premium overtime payments.

(f) The term "defense contractor" means any person who enters into a contract with the United States for the production of material or the performance of services for the national defense.

(Sept. 8, 1950, ch. 932, title VII, § 702, 64 Stat. 815; June 30, 1953, ch. 171, § 8, 67 Stat. 130; Aug. 15, 1970, Pub. L. 91-379, title I, § 102, 84 Stat. 796.)

§ 2153. Delegation of authority; creation of new agencies; appointment and compensation of officers and personnel; State representation in regional offices

(a) Except as otherwise specifically provided, the President may delegate any power or authority conferred upon him by this Act [sections 2061 to 2169 of this Appendix] to any officer or agency of the Government, including any new agency or agencies (and the President is authorized to create such new agencies, other than corporate agencies, as he deems necessary), and he may authorize such redelegations by that officer or agency as the President may deem appropriate. The President is authorized to appoint heads and assistant heads of any such new agencies, and other officials therein of comparable status, and to fix their compensation, without regard to the Classification Act of 1949, as amended [5 U. S. C. 5101 et seq. and 5331 et seq.], the head of one such agency to be paid at a rate comparable to the compensation paid to the heads of executive departments of the Government, and other such heads, assistant heads, and officials at rates comparable to the compensation paid to the heads and assistant heads of independent agencies of the Government. Any officer or agency may employ civilian personnel for duty in the United States, including the District of Columbia, or elsewhere, without regard to section 14 of the Federal Employees Pay Act of 1946 (60 Stat. 219), as the President deems necessary to carry out the provisions of this Act [sections 2061 to 2169 of this Appendix].

(b) The head and assistant heads of any independent agency created to administer the authority conferred by title IV of this Act [former sections 2101 to 2112 of this Appendix] shall be appointed by the President, by and with the advice and consent of the Senate. There shall be included among the policy-making officers of each regional office administering the authority conferred by title IV of this Act [said sections] a resident of each State served by such office whose governor requests such representation.

(Sept. 8, 1950, ch. 932, title VII, § 703, 64 Stat. 816; July 31, 1951, ch. 275, title I, § 109 (a), (b), 65 Stat. 139.)

* * *

§ 2154. Rules, regulations, and orders

The President may make such rules, regulations, and orders as he deems necessary or appropriate to carry out the provisions of this Act [sections 2061 to 2169 of this Appendix]. Any regulation or order under this Act [said sections] may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions as in the judgment of the President are necessary or proper to effectuate the purposes of this Act [said sections], or to prevent circumvention or evasion, or to facilitate enforcement of this Act [said sections], or any rule, regulation, or order issued under this Act [said sections]. No rule, regulation, or order issued under this Act [said sections] which restricts the use of natural gas (either directly, or by restricting the use of facilities for the consumption of natural gas, or in any other manner) shall apply in any State in which a public regulatory agency

has authority to restrict the use of natural gas and certifies to the President that it is exercising that authority to the extent necessary to accomplish the objectives of this Act [said sections].

(Sept. 8, 1950, ch. 932, title VII, § 704, 64 Stat. 816; July 31, 1951, ch. 275, title I, § 109 (c), 65 Stat. 139.)

§ 2156. Jurisdiction of courts; injunctions; venue; process; effect of termination of provisions

(a) Whenever in the judgment of the President any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act [sections 2061 to 2169 of this Appendix], he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the President that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond.

(b) The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this Act [sections 2061 to 2169 of this Appendix] or any rule, regulation, order, or subpoena thereunder, and of all civil actions under this Act [said sections] to enforce any liability or duty created by, or to enjoin any violation of, this Act [said sections] or any rule, regulation, order, or subpoena thereunder. Any criminal proceeding on account of any such violation may be brought in any district in which any act, failure to act,

or transaction constituting the violation occurred. Any such civil action may be brought in any such district or in the district in which the defendant resides or transacts business. Process in such cases, criminal or civil, may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found; the subpoena for witnesses who are required to attend a court in any district in such case may run into any other district. The termination of the authority granted in any title or section of this Act [said sections], or of any rule, regulation, or order issued thereunder, shall not operate to defeat any suit, action, or prosecution, whether theretofore or thereafter commenced, with respect to any right, liability, or offense incurred or committed prior to the termination date of such title or of such rule, regulation, or order. No costs shall be assessed against the United States in any proceeding under this Act [said sections]. All litigation arising under this Act [said sections] or the regulations promulgated thereunder shall be under the supervision and control of the Attorney General.

(Sept. 8, 1950, ch. 932, title VII, § 706, 64 Stat. 817; July 31, 1951, ch. 275, title I, § 109 (e), 65 Stat. 139.)

§ 2157. Liability for compliance with invalid regulations; discrimination against orders or contracts affected by priorities or allocations

No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act [sections 2061 to 2169 of this Appendix], notwithstanding that any such rule, regulation, or

order shall thereafter be declared by judicial or other competent authority to be invalid. No person shall discriminate against orders or contracts to which priority is assigned or for which materials or facilities are allocated under title I of this Act [sections 2071 to 2074 of this Appendix] or under any rule, regulation, or order issued thereunder, by charging higher prices or by imposing different terms and conditions for such orders or contracts than for other generally comparable orders or contracts, or in any other manner.

(Sept. 8, 1950, ch. 932, title VII, § 707, 64 Stat. 818; June 30, 1952, ch. 530, title I, § 118, 66 Stat. 306.)

APPENDIX E

PART 651—BASIC RULES OF THE DEFENSE PRIORITIES SYSTEM (DPS REG. 1)

Section 1. What this regulation does.

(a) This regulation is a major revision and simplification of the Defense Priorities System and supersedes DPS Reg. 1 of March 23, 1953 (including its List A, Directions, Amendments, and published Interpretations issued prior to the effective date of this regulation). DPS not only helps to keep current defense, atomic energy, and space programs (collectively referred to as "defense programs") on schedule but also provides an established operating mechanism that can be expanded or converted if the need arises. This regulation complements and is being issued concurrently with a major revision of Defense Materials System Regulation 1.

(b) Defense contractors and their suppliers should thoroughly familiarize themselves with the provisions of DMS Reg. 1 and with the provisions of this regulation which define their rights and obligations and set forth the basic rules of the Defense Priorities System. One of the principal differences between DMS and DPS, which complement each other, is that the former relates primarily to controlled materials (steel, copper, aluminum, and nickel alloys) while the latter relates primarily to products and materials other than controlled materials.

(c) Persons engaged in programs for military and atomic energy production or construction, military assistance to any foreign nation, stockpiling, space, and directly related activity are required to follow all the applicable rules of this revised regulation. The obligatory identifi-

cation of delivery orders placed for products and materials needed to fill mandatory acceptance orders is particularly important. It avoids delays which could adversely affect timely completion of defense programs by requiring preferential delivery against properly identified orders and by furnishing a mechanism for expediting assistance where needed.

(d) The changes effected by this revised regulation are essentially simplifications of a procedural or technical type but they do include some substantive changes:

(1) Defense contractors are now required, with certain exceptions, to use their inventory first in filling rated orders.

(2) The revised regulation expressly prohibits discrimination against mandatory acceptance orders with respect to prices and terms of sale.

(3) An express provision authorizing appeals from adverse decisions has been incorporated in the revised regulation.

(4) A new Schedule I has been added to the revised regulation. It lists Authorized Program Identifications and Defense Agencies.

(5) A new schedule II has been added to the regulation. It supersedes and revises the former List A to DPS Reg. 1 and lists Materials and Services Not Subject to BDC Rating Authority.

(6) Direction 2 (Limitation on Use of Ratings to Obtain Nickel), Direction 3 (Notice of Acceptance or Rejection of DX Rated Orders and of Delayed Shipment of Certain DO Rated Orders) and Direction 4 (Establishment

of a Lead Time for the Placement of Rated Orders for the Delivery of Nickel and Ferro-nickel) to DPS Reg. 1 are being revoked. The substance of former Direction 4, however, has been revised and is being issued concurrently with this regulation as DPS Order 2 (Nickel).

(7) Numerous other changes, simplifications and consolidations have been effected in this revised regulation, the full text of which (including its Schedules I and II) should be studied carefully by defense contractors and their suppliers.

[39 FR 23022, June 25, 1974, as amended by Reg. 1; Amdt. 5, 41 FR 40106, Sept. 17, 1976]

Sec. 2. Definitions.

As used in this regulation:

(a) "Person" means any individual, corporation, partnership, association, or any other organized group of persons, and includes any agency of the United States Government or any other government.

(b) "BDC" means the Bureau of Domestic Commerce, Domestic and International Business Administration, United States Department of Commerce.

(c) "GSA" means the General Services Administration of the United States Government.

(d) "Material" means any raw, in-process, or manufactured commodity, equipment, component, accessory, part, assembly, or product of any kind.

(e) "Controlled material" means domestic and imported steel, copper, aluminum, and nickel alloys, in the forms and shapes specified in Schedule I of DMS Reg. 1, whether new, remelted, rerolled, or redrawn.

(f) "Maintenance, repair and operating supplies" (MRO) means materials for maintenance, repair and operating supplies, and for installation, as defined in Direction 1 to DMS Reg. 1.

(g) "Production equipment" means any item used in producing materials or furnishing services which is carried by a person as capital equipment according to his established acounting practice.

(h) "Established accounting practice" means, in the case of a person in operation on or before December 31, 1973, the accounting practice in use by such person on that date or on the last day of his operation prior thereto. In the case of a person whose operation begins after December 31, 1973, the term means the accounting practice established by him in such operation.

(i) "Defense Agency" means a defense or defense-supporting department or agency including the Department of Defense, the Atomic Energy Commission, BDC, or any other Government agency or subdivision thereof designated as such by GSA for the purposes of this regulation or any other regulation or order of BDC. Schedule I of this regulation lists the Defense Agencies.

(j) "Authorized program" means any program determined by the Director, Federal Preparedness Agency/GSA as being necessary or appropriate to promote the national defense.

(k) "Set-Aside" means the amount of any product or material, including controlled materials, which a person is required to reserve for filling mandatory acceptance orders during specified periods of time, as prescribed by BDC.

(l) "Self-authorizing consumer" means any person who receives authority for procurement by self-authorization pursuant to the provisions of this regulation.

(m) "Delivery order" means any purchase order, contract, shipping, or other instruction calling for delivery of any material or product, or performance of construction or service, on a particular date or dates or within specified periods of time.

(n) "Rated order" means any delivery order for any product, service, or material other than controlled material bearing an authorized rating and the certification required by this regulation or any other applicable regulation or order of BDC.

(o) "Authorized controlled material order" (ACM order) means any delivery order for any controlled material (as distinct from a product containing controlled material) bearing an authorized program identification, the calendar quarter in which delivery is required, and the certification required by DMS Reg. 1 or any other applicable regulation of order of BDC. The term "ACM order" shall have the same meaning as "authorized controlled material order."

(p) "Mandatory acceptance order" means a rated order, an ACM order, or any other delivery order which a person is required to accept pursuant to any regulation or order of BDC, or pursuant to a specific authorization or directive of BDC.

(q) "Directive" means an official action taken in writing by BDC which requires a named person to take an action or refrain from taking an action in accordance with its provisions.

(d) (sic) "National Defense" means programs for military and atomic energy production or construction, military assistance to any foreign nation, stockpiling, space, and directly related activity.

[39 FR 23022, June 25, 1974, as amended by Reg. 1; Amdt. 5, 41 FR 4016, Sept. 17, 1976]

Sec. 3. General provisions.

(a) Defense Agencies are authorized to place rated orders for products and materials, other than controlled materials, needed for authorized programs, as provided in Section 6 of this regulation.

(b) BDC may establish set-asides for acceptance of rated orders by producers of certain products and materials, other than controlled materials, needed for authorized programs. Set-asides for controlled materials are established by BDC pursuant to DMS Reg. 1 and other applicable regulations and orders of BDC.

(c) A person who receives a rated order from a Defense Agency or any other customer, or who is authorized by BDC or another Defense Agency to use ratings, is a self-authorizing consumer and must obtain his requirements to fill such order in accordance with paragraph (d) of this section.

(d) In filling rated orders, a self-authorizing consumer must obtain (1) his requirements for controlled materials in accordance with the provisions of DMS Reg. 1 and (2) his requirements for products and materials other than controlled materials in accordance with the provisions of this regulation.

(e) Ratings shall have no effect on delivery orders for controlled materials which shall be procured by the placement of authorized controlled material (ACM) orders pursuant to DMS Reg. 1 and other applicable regulations and orders of BDC.

[39 FR 23022, June 25, 1974, as amended by Reg. 1; Amdt. 5, 41 FR 40108, Sept. 17, 1976]

Sec. 4. Types of ratings and preferential status.

(a) Two types of ratings are authorized, a DO rating and a DX rating. Ratings must contain the prefix DO or DX as the case may be, followed by the appropriate program identification. Schedule I of this regulation contains a list of authorized program identifications.

(b) Rated orders must show the rating authorized: for example, DO-A-6, the date or dates on which delivery is required and must be certified as provided in section 8 of this regulation.

(c) All DO rated orders shall have equal preferential status and shall take precedence over unrated orders previously or subsequently received. All DX rated orders shall have equal preferential status and shall take precedence over DO rated orders and unrated orders previously or subsequently received.

Sec. 5. Directives and preferential status.

(a) A person shall comply with each directive issued to him by BDC. A recipient of a directive from BDC shall not use such directive to obtain any products, materials, or

services from a supplier by placing a mandatory acceptance order, unless expressly authorized in the directive.

(b) Directives issued by BDC shall take precedence over DX rated orders, DO rated orders and unrated orders previously or subsequently received, unless a contrary instruction appears in the directive.

Sec. 6. Use of ratings.

(a) When necessary or appropriate to promote the national defense, each defense Agency is authorized to use, subject to all provisions of BDC Dels. 1, 2 and 3, rating authority in acquiring products, materials and services needed for completion of authorized programs, including inventory replacement in accordance with section 7 of this regulation. Authorizations by BDC to Defense Agencies to use ratings, whether by delegation, regulation, order or otherwise, does not include authority to use DX ratings unless expressly so stated therein.

(b) Each person who has received a rated order must acquire products, materials, and services to fill such order by self-authorization, pursuant to section 7 of this regulation.

(c) The mandatory provisions of this section need not be followed in the case of any individual delivery order of $2500 or less.

[39 FR 23022, June 25, 1974, as amended by Reg. 1; Amdt. 5, 41 FR 40106, Sept. 17, 1976]

Sec. 7. Self-authorization procedure for rated orders.

(a) A person who has accepted a rated order is a self-authorizing consumer.

(b) A self-authorizing consumer must use the program identification indicated on his rated order in placing ACM orders to obtain controlled materials needed to fill such order in accordane with the provisions of 32A CFR Part 621 (DMS Reg. 1). Persons may use the program identification indicated on his rated order to replace in inventory controlled materials used to fill such rated order in accordance with the provisions of 32A CFR part 621 (DMS Reg. 1).

(c) A self-authorizing consumer must use the rating indicated on his rated order in obtaining services and products and materials, other than controlled materials, needed to fill such order. He may use the rating indicated on his rated order to replace in inventory products and materials, used to fill such rated order. However, with respect to inventory replacement of products and materials other than controlled materials he shall place rated orders only in the calendar month in which such products and materials were taken from inventory or in the immediately succeeding two calendar months. If it is impracticable for him to determine the exact requirements for products and materials other than controlled materials needed to fill a rated order, he must place rated orders for an amount not exceeding his best estimates of such products and materials needed to fill such rated order.

(d) If the requirement that he use the program identifications indicated on his customers' rated orders is impracticable because they are varied or numerous, a self-authorizing consumer may use the program identification B-5 in lieu thereof.

(e) A self-authorizing consumer shall fill a rated order with products and materials from his inventory (to

the extent that he has such products and materials in inventory). However, if the requirement that he use products and materials from inventory would stop or interrupt his operation during the next 60 days in a way which would cause a substantial loss of total production or a substantial delay in his operations, he need not do so.

(f) No person shall discriminate against mandatory acceptance orders by imposing higher prices or by imposing different terms and conditions for such orders than for generally comparable orders which are not mandatory acceptance orders, or in any other manner.

[39 FR 23022, June 25, 1974, as amended by Reg. 1; Amdt. 5, 41 FR 40106, Sept. 17, 1976]

Sec. 8. Statements and certifications to accompany rated orders.

(a) Each Defense Agency and self-authorizing consumer placing a rated order must in addition to indicating the appropriate rating and delivery date or dates on such order, furnish his supplier with a statement reading substantially as follows:

> You are required to follow the provisions of DPS Reg. 1 and of all other applicable regulations and orders of BDC in obtaining products, materials, and services needed to fill this order.

This statement must appear on the order or on a separate piece of paper attached to the order.

(b) Unless another form of certification is specifically prescribed by an applicable regulation or order of BDC, every rated order must contain the certification prescribed in DMS Reg. 1 or the following certification:

> Certified for national defense use under DPS Reg. 1.

and shall be signed as provided in paragraph (e) of this section. This certification accompanying a rated order shall have the same effect as a certification under DMS Reg. 1.

(c) Unless another form of certification is specifically prescribed by an applicable regulation or order of BDC, every authorized controlled material (ACM) order must contain the following certification:

> Certified for national defense use under DMS Reg. 1.

and shall be signed as provided in paragraph (e) of this section.

(d) The certifications provided for in paragraphs (b) and (c) of this section shall constitute a representation to the supplier and to BDC that subject to the criminal penalties provided in applicable United States statutes, (1) the amount ordered by the purchaser is within the amount needed by him to fill the related mandatory acceptance order accepted by him and (2) the purchaser is expressly authorized by BDC, or by any applicable regulation or order of BDC, to place such mandatory acceptance order.

(e) A certification on a rated order or an ACM order must be signed by a responsible individual who is duly authorized in writing to sign for that purpose. The signature must be either by hand or in the form of a facsimile reproduction of a handwritten signature. If a facsimile signature is used, the individual who uses it must be duly authorized in writing to use it for this purpose by the person whose signature it is, and a written record of the authorization must be retained on file. A certification may

be authenticated by a method other than a signature or a facsimile signature, such as by automatic data processing transmission, in which case a record must be maintained by the user describing the manner in which the authentication is transmitted and the manner in which the authentication is authorized.

Sec. 9. Delivery, acceptance, and performance dates for rated orders.

(a) Any order which fails to specify a delivery date or dates shall not be treated as a rated order. The words "immediately" or "as soon as possible" shall not constitute a delivery date. However, a person shall accept a so-called "requirements contract" bearing a rating which contains no specific delivery date or dates but which provides for the furnishing of materials, products, or services from time to time or within a stated period against specific purchase orders or "calls." Such specific purchase orders or "calls" shall be deemed rated as of the date of their placement by the purchaser and not as of the date of the original "requirements contract."

(b) A person who receives a DO rated order must transmit notification to the person who tendered such order of its acceptance or rejection within ten consecutive calendar days after its receipt. In the case of a DX rated order such notification must be transmitted within five consecutive calendar days after its receipt.

(c) A person who has accepted a rated order must make shipment on such order as close to the requested delivery date as is practicable. If a person, after accepting a rated order, finds that due to contingencies, which he

could not reasonably have foreseen, he is obliged to postpone the shipment date, he must promptly notify his customer of the approximate date when shipment can be made, of any subsequent changes in that date, and of the reasons for the delay. Such notification must be transmitted in writing within five consecutive calendar days after occurrence of the event causing the delay.

Sec. 10. Limitations on use of self-authorization.

(a) Each person who has accepted a rated order must acquire products, materials and services to fill such order by self-authorization pursuant to section 7 of this regulation. He may acquire products and materials to replace in inventory those used to fill such rated order by self-authorization pursuant to section 7 of this regulation.

(b) Ratings shall not be used and shall have no effect on orders for (1) controlled materials and (2) products, materials, and services listed in Schedule II of this regulation. Controlled materials shall be procured in accordance with the provisions of DMS Reg. 1.

(c) Products and materials which may be obtained by a person pursuant to the self-authorization provisions of this regulation to fill a rated order shall include only:

(1) (i) Those which will be physically incorporated into the product or material covered by the rated order and the portion of such products and materials normally consumed or converted into scrap or by-products in the course of processing.

(ii) Chemicals used directly in production to fill the rated orders.

(iii) Products and materials used for packaging or containers required to make delivery against the rated order.

They shall not include:

(2) (i) Products and materials for plant improvement, expansion or construction, unless they will be physically incorporated into a construction project covered by a rated order.

(ii) Production equipment or products and materials to be used for the manufacture of production equipment.

(iii) Maintenance, repair and operating supplies (MRO), Direction 1 to DMS Reg. 1 provides a separate self-authorization procedure to obtain MRO needed to fill mandatory acceptance orders.

(d) In the event a person is not permitted to place a mandatory acceptance order because of the restrictions prescribed in paragraph (c) of this section, and he needs special priorities authorization, he shall apply for such an authorization in accordance with section 11 of this regulation.

(e) In the event a person has placed a mandatory acceptance order and needs expediting assistance to obtain timely delivery, or if he cannot find a supplier who will accept a mandatory acceptance order he attempts to place, he shall apply for assistance in accordance with section 12 of this regulation.

(f) A person shall not place a mandatory acceptance order for products, materials, or services in anticipation of receipt by him of a mandatory acceptance order.

[39 FR 23022, June 25, 1974, as amended by Reg. 1; Amdt. 5, 41 FR 40106, Sept. 17, 1976]

Sec. 11. Special priorities authorizations.

(a) If inability to obtain production equipment or any other product, material, or facility because of the restrictions prescribed in section 10 (c) of this regulation would result in failure by a person to fill a mandatory acceptance order, he shall request special priorities authorization from the appropriate Defense Agency specified in Schedule I of this regulation. In such cases the person requesting special priorities authorization shall submit his request on the appropriate form prescribed by the applicable Defense Agency.

(b) In any case where use of a rating is specifically authorized for the procurement of production equipment pursuant to paragraph (a) of this section, the rating may be used either to purchase such equipment or to lease such equipment. However, in the latter case, the equipment may be leased only from a person engaged in the business of leasing such equipment, or from a person willing to lease rather than sell.

Sec. 12. Expediting assistance and assistance in placing mandatory acceptance orders.

(a) If a person has placed a mandatory acceptance order and needs expediting assistance to obtain timely delivery, he shall request expediting assistance from the appropriate Defense Agency specified in Schedule I of this regulation. Such request shall be submitted on Form DIB-999 (Formerly BDSAF-138) which may be obtained from U. S. Department of Commerce District Offices or from the Bureau of Domestic Commerce, U. S. Department of Commerce, Washington, D. C. 20230.

(b) If a person cannot find a supplier who will accept a mandatory acceptance order he attempts to place, he shall request assistance in placing such order from the appropriate Defense Agency specified in Schedule I of this regulation. Such request shall be submitted on Form DIB-999 (Formerly BDSAF-138) which may be obtained from U. S. Department of Commerce District Offices or from the Bureau of Domestic Commerce, U. S. Department of Commerce, Washington, D. C. 20230.

(c) Requests for assistance made in accordance with paragraph (a) or paragraph (b) of this section must establish that:

(1) there is an urgent defense related need for the products, materials or services, covered by the associated mandatory acceptance order,

(2) applicant has exercised reasonable effort to resolve the problem through employment of his own resources, and

(3) the request for assistance is timely.

[39 FR 23022, June 25, 1974, as amended by Reg. 1; Amdt. 5, 41 FR 40106, Sept. 17, 1976]

Sec. 13. Use of ratings to obtain services.

(a) Each person who requires services to fill a rated order shall use the rating that accompanied such order in placing a rated order to obtain the required services with a person customarily engaged in supplying such services. The person receiving a rated order for services shall use the rating he has received to obtain products, materials, and services he needs to fill the rated order for services.

(b) The provisions of this section do not apply to the furnishing of personal or professional services nor to contracts of employment.

(c) Ratings shall have no effect in obtaining services listed in Schedule II of this regulation.

Sec. 14. Combination of orders and minimum quantities.

(a) No person shall combine a rated order with an unrated order. If the quantity needed to fill a rated order is less than the minimum commercially procurable quantity of a product or material, then a rated order shall be placed for such minimum commercially procurable quantity.

(b) Rated orders identified by different ratings may be combined if the portion covered by each is specifically identified by the appropriate rating, unless the program identification B-5 is used as provided in section 7 (d) of this regulation. In addition, if the quantity of a product or material needed to fill rated orders is less than the minimum commercially procurable quantity, a rated order shall be placed for such minimum commercially procurable quantity, using the program identification B-5. However, no person shall place separate rated orders solely for the purpose of obtaining minimum commercially procurable quantities to fill such separate orders.

Sec. 15. Restrictions on placing rated orders and on use of materials.

(a) No person shall place a rated order unless he is entitled to do so. No person shall place a rated order calling for delivery of any product or material in a greater amount (except as provided in section 14 of this regula-

tion) or on an earlier date than required to fill his rated orders.

(b) Each person who has obtained products or materials pursuant to a rated order in accordance with this or any other regulation or order of BDC shall use such products or materials only (1) to fill rated orders, or (2) to replace in inventory products or materials used to fill any such rated orders (in accordance with section 7 of this regulation). If he cannot use the products or materials for any such purpose, he may use them to fill unrated orders or dispose of them, unless otherwise ordered or directed in writing by BDC.

Sec. 16. Sequence of filling rated orders.

A person who has accepted rated orders must schedule his operations, if possible, to fill each rated order by the required delivery or performance date, regardless of the sequence in which the orders were received. If this is not possible, he must give precedence as follows:

(a) DX rated orders take precedence over DO rated orders and unrated orders, and DO rated orders take precedence over unrated orders.

(b) As between conflicting rated orders of equal priority status, precedence shall be given to the order which was received first.

(c) As between conflicting rated orders of equal priority status received on the same day, precedence shall be given to the order which has the earliest required delivery or performance date.

Sec. 17. Rules for acceptance of rated orders.

(a) Every rated order must be accepted and filled regardless of existing contracts and orders except as provided in this section or in section 18. "Existing contracts and orders" include not only ordinary contracts but other arrangements achieving substantially the same results, and may concern the use of facilities rather than the material produced.

(b) A person shall not accept a DO rated order for delivery on a date which would interfere with delivery of any previously accepted DO or DX rated order.

(c) A DX rated order must be accepted without regard to the effect of such acceptance on the filling of DO rated or undated orders: *Provided,* That a person shall not accept a DX rated order for delivery on a date which would interfere with delivery of any previously accepted DX rated order.

(d) A person shall not accept a rated order for delivery on a specific date unless he expects to be able to fill the order by that date. If he cannot meet the requested delivery date he shall promptly inform the customer of the earliest possible delivery date and offer to accept the order on the basis of that date.

(e) An unrated order may be converted into a rated order by written notification to the supplier that such order shall be treated as a rated order, if the person originally placing the order is authorized to use a rating and if he complies with the provisions of this regulation relating to placement of rated orders. In such event the order shall be deemed a rated order as of the date the rating and certification are received by the supplier.

Sec. 18. Rules for rejection of rated orders.

(a) A supplier may reject a rated order in the following cases, but he shall not discriminate among customers in rejecting or accepting rated orders:

(1) If the person seeking to place the order is unwilling or unable to meet the supplier's regularly established terms of sale or payment.

(2) If the order is for a product or material not usually made or supplied or for a service not usually performed.

(3) If the order is tendered to a person for a product or material which he produces or acquires only for his own use, and he has not filled any orders for that product or material within the past two years.

(4) If the order is for a product or material produced by the person tendering the rated order or for a service performed by the person tendering the rated order.

(5) If the order is received after commencement of the applicable lead time as prescribed by BDC: *Provided,* That a DX rated order must be accepted without regard to lead time, unless it is impracticable for him to make delivery within the required delivery month, in which event he must accept such order for the earliest practicable delivery date.

(6) If the applicable set-aside has been reached or would be exceeded by acceptance, except that a DX rated order must be accepted without regard to such set-aside.

(7) If acceptance or performance of the order would violate any other regulation or order of BDC.

(b Any person who refuses to accept a rated order shall, upon written request, of the person tendering the order, promptly give his reasons in writing for the refusal.

Sec. 19. How changes in orders affect ratings.

(a) Except as otherwise provided in this section, when a customer makes a change in a rated order which interferes with the supplier's production schedule, the rating is cancelled and the order shall be deemed newly rated on the date the supplier receives notification of the change.

(b) A change in shipping destination does not constitute cancellation of the rating.

(c) A reduction in the total amount of the order does not constitute a cancellation of the rating: *Provided,* That if the amount is reduced below the minimum quantity that the supplier normally accepts, and the customer is unwilling to agree to that minimum quantity, the supplier may consider that the rating is cancelled.

(d) An increase in the total amount of the order which can be filled with negligible interference with the supplier's production for previously accepted rated orders shall not constitute a cancellation of the rating: *Provided,* That if the acceptance of the larger order would result in substantial interference with the supplier's production, the amount of the increase shall be treated as a rated order as of the date of receipt of notification of such increase by the supplier.

(e) A change in the delivery date does not constitute cancellation of the rating: *Provided,* That if the change

interferes with timely delivery on any other rated order it shall constitute a cancellation of the original rating and the order shall be deemed rated as of the date of receipt by the supplier of notification of the changed delivery date.

(f) A minor variation in size, design, or capacity which can be effected by the supplier without interference with other rated orders does not constitute a cancellation of the rating.

(g) A change which is agreed upon between the supplier and the customer and which does not interfere with other rated orders does not constitute a cancellation of the rating.

(h) The application of a DX rating to an order bearing a DO rating shall give the order, as of the date of application of the DX rating, the preferential status accorded to DX orders under the provisions of this regulation.

Sec. 20. Cancellation of ratings.

(a) If a rating is revoked or invalidated by any regulation, order, or directive of BDC, such rating shall be cancelled in accordance with the provisions of such regulation, order, or directive.

(b) A rating shall also be cancelled because of contract termination on the part of a Defense Agency, determination by a person that he did not properly use a rating, or determination by a person that he no longer needs the product, material, or service for which he used the rating.

(c) When a rating is cancelled, the person who used the rating shall promptly inform his supplier in writing

that the rating is cancelled and that his order is no longer to be treated as a rated order.

Sec. 21. Intracompany deliveries.

The provisions of this regulation apply not only to deliveries to other persons, including affiliates and subsidiaries, but also to deliveries from one branch, division, or section of a single enterprise to another branch, division, or section of the same or any other enterprise under common ownership or control.

Sec. 22. Delivery for unlawful purposes prohibited.

No person shall deliver any product or material which he knows or has reason to believe will be accepted, redelivered, held, or used in violation of any regulation or order of BDC.

Sec. 23. Applicability of regulations and orders.

(a) All regulations and orders of BDC, unless specifically stated otherwise in such regulations and orders, shall apply to transactions in any state, territory, or possession of the United States and the District of Columbia.

(b) All regulations and orders of BDC shall apply to all subsequent transactions even though they are covered by contracts previously entered into.

(c) Nothing in this regulation shall be construed to relieve any person from complying with all other applicable regulations and orders of BDC. In case compliance by any person with the provisions of any such regulation or order would prevent fulfillment of a mandatory acceptance order, he shall immediately report the matter to BDC which will thereupon take such action as is deemed appropriate, but unless and until otherwise expressly au-

thorized or directed by BDC, such person shall comply with the provisions of such regulation or order.

(d) This regulation complements DMS Reg. 1. Defense contractors and their suppliers should be thoroughly familiar with both this regulation and DMS Reg. 1.

Sec. 24. Protection against claims for damages.

No person shall be held liable for damages or penalties, for any act or failure to act resulting directly or indirectly from compliance with any BDC regulation, order, direction, directive, or other written instruction, notwithstanding that any such regulation, order, direction, directive, or other written instruction shall thereafter be declared by judicial or other competent authority to be invalid.

Sec. 25. Records and reports.

(a) Each person participating in any transaction covered by this regulation shall make, and preserve for at least three years thereafter, accurate and complete records thereof. Such records shall include all rated orders, ACM orders, and directives received by such person, copies of all rated orders and ACM orders placed by such person, records of purchases, receipts, inventories, production, use, sales, and deliveries of all materials, acquired, sold or delivered pursuant to mandatory acceptance orders. Records shall be maintained in sufficient detail to permit the determination, upon examination or audit, whether or not each transaction complies with the provisions of this regulation or any other applicable regulation or order of BDC. However, this regulation does not specify any particular accounting method or system to be used. Records

may be retained in the form of microfilm or other record-keeping systems which provide the information contained in the original records.

(b) All records required by this regulation shall be made available for inspection and audit by duly authorized representatives of BDC at the usual place of business of the person involved.

(c) Persons subject to this regulation shall develop and maintain such records and submit such reports to BDC as it shall require, subject to the terms of the Federal Reports Act of 1942 (44 U. S. C. 3501-3511).

Sec. 26. Requests for adjustment or exception and appeals.

(a) Any person subject to any provision of this regulation may submit a request for adjustment or exception to BDC upon the ground that such provision works an undue or exceptional hardship upon him not suffered generally by others in the same trade or industry, or that its enforcement against him would not be in the interest of the national defense or in the public interest. The submission of a request for adjustment or exception shall not relieve any person of his obligation to comply with any such provision. In examining requests for adjustment or exception claiming that the public interest is prejudiced by the application of any provision of this regulation, consideration will be given to the requirements of public health and safety, civil defense, and dislocation of labor and resulting unemployment that would impair the defense program. Each request shall be in writing, by letter in triplicate, addressed as provided in section 27(a) of this regulation, and shall set forth all pertinent facts and the nature of the relief sought, and shall state the justification therefor.

(b) Any person may appeal to the Appeals Board for the Department of Commerce from an adverse decision against him by BDC pursuant to this regulation. Each appeal shall be submitted to the Appeals Board not later than 45 days after receipt by the appellant of an adverse decision and shall be in writing, by letter in triplicate, addressed as provided in section 27(b) of this regulation, and shall set forth all pertinent facts and the nature of the relief sought, and shall state the justification therefor. In addition, one copy of such letter shall be furnished to BDC by the appellant, addressed as provided in section 27(a) of this regulation. The decision of the Appeals Board shall be final within the Department and shall be provided in writing to the appellant and to BDC.

Sec. 27. Communications.

(a) All communications concerning this regulation or requests for adjustment or exception pursuant to section 26(a) of this regulation shall be addressed to the Bureau of Domestic Commerce, U. S. Department of Commerce, Washington, D. C. 20230, Ref.: DPS Reg. 1.

(b) All appeals pursuant to section 26(b) of this regulation shall be addressed to the Appeals Board, U. S. Department of Commerce, Washington, D. C. 20230, Ref.: DPS Reg. 1.

Sec. 28. Violations.

(a) Any person who willfully violates any provision of this regulation, or who willfully furnishes false information or conceals any material fact in the course of operation under this regulation, is guilty of a crime and upon conviction may be punished by fine or imprisonment, or both.

(b) Violation of any provision of this regulation may subject any person committing or participating in such violation to administrative action to suspend his privilege of making or receiving deliveries of products or materials, or using products, materials, or facilities. In addition to such administrative action, an injunction and order may be obtained from a court of appropriate jurisdiction prohibiting any such violation and enforcing compliance with the provisions hereof.

(c) For the purposes of any administrative action or civil proceeding for the enforcement of this regulation or any criminal prosecution for violation of this regulation, the terms "rated order," "rating," "authorized controlled material order," "ACM order" and "certification" shall be deemed to include every purported rated order, rating, authorized controlled material order, ACM order and certification whether or not such order, rating or certification shall have been authorized as provided in this regulation and irrespective of the form of such order, rating or certification.

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No. 82-1109

In the Supreme Court of the United States

OCTOBER TERM, 1982

KEARNEY & TRECKER CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government's accelerated delivery directive under the Defense Production Act of 1950, which caused petitioner to lose a contract with Rolls Royce, was a "taking" compensable under the Fifth Amendment.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 2

Argument 5

Conclusion 10

Appendix index 1a

TABLE OF AUTHORITIES

Cases:

Almeida-Sanchez v. *United States*, 413 U.S. 266 7

Georgia-Pacific Corp. v. *United States*, 640 F.2d 328 5

Kimball Laundry Co. v. *United States*, 338 U.S. 1 7

Legal Tender Cases, 79 U.S. (12 Wall.) 457 5

Mitchell v. *United States*, 267 U.S. 341 5

Omnia Commercial Co. v. *United States*, 261 U.S. 502 ..... 5, 6, 7

R.J. Widen Co. v. *United States*, 357 F.2d 988 5

T.O.F.C., Inc. v. *United States*, 683 F.2d 389 5

United States ex rel. TVA v. *Powelson*, 319 U.S. 266 6

Page

Constitution, statute and regulations:

U.S. Const. Amend. V 4, 5, 7

Defense Production Act of 1950, 50 U.S.C. (& Supp. IV) App. 2061 *et seq.* 2

50 U.S.C. App. 2071(a)(1) 2

15 C.F.R. Part 350:

Section 3-5 2
Section 5 2
Section 7 3
Section 24 9
Section 26 ..... 8, 9
Section 26(a) 4, 9
Section 26(b) 4

15 C.F.R. Part 353 sched. I 2

Exec. Order No. 10,480, 3 C.F.R. 962 (1949-1953 Compl.) 2

Miscellaneous:

4 J. Sackman, *Nichols on Eminent Doman* (3d ed. 1981) 5

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1-9) is reported at 688 F.2d 780.

JURISDICTION

The judgment of the Court of Claims was entered on September 8, 1982 (Pet. App. 9). A petition for rehearing was denied on September 30, 1982 (Pet. App. 10). The petition for a writ of certiorari was filed on December 29, 1982. The jurisdiction of this Court is invoked under former 28 U.S.C. 1255(1).[1]

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[1]28 U.S.C. 1255 was repealed effective October 1, 1982, by Sections 123 and 402 of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 36, 57. Although the judgment of the Court of Claims was rendered prior to that date, the petition was not filed until after Section 1255 had been repealed. In addition, none of the provisions of Section 403 of the Federal Courts Improvement Act, which

STATEMENT

1. The Defense Production Act of 1950 ("DPA"), 50 U.S.C. (& Supp. IV) App. 2061 *et seq.*, authorizes the President to require that priority be given to "contracts or orders * * * which he deems necessary or appropriate to promote the national defense * * *." 50 U.S.C. App. 2071(a)(1). That authority, delegated to the Department of Commerce by Exec. Order No. 10,480, 3 C.F.R. 962 (1949-1953 Compl.), has been implemented by regulations promulgated by the Department's Office of Industrial Mobilization ("OIM").[2] The regulations involved in this case, known as the Defense Priorities System ("DPS"), allow contracts and orders to be rated in one of two ways, each of which gives the rated order priority over unrated orders. 15 C.F.R. Part 350, Sections 3-5. The regulations also provide that a directive takes precedence even over other rated orders. *Id.* Section 5.

2. On December 21, 1979, Lockheed-California Co. ("Lockheed") issued a purchase order requesting petitioner to deliver a 5-Axis Modu-Line Traveling Column Machining Center ("Modu-Line")[3] by December 15, 1981. Lockheed ordered its Modu-Line for use in a classified contract

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governs the transfer of pending cases from the Court of Claims, appears to address the availability of certiorari review of cases decided prior to October 1, 1982, but not filed in this Court until after that date. Nevertheless, we assume that for purposes of certiorari review this case may be deemed to have been automatically transferred to the new Federal Circuit on October 1, 1982, and that the jurisdiction of this Court may therefore properly be invoked under 28 U.S.C. 1254(1).

[2]OIM was redesignated the Office of Industrial Resource Administration effective September 18, 1981.

[3]Metalworking machines including machining centers are covered by the DPS. See 15 C.F.R. Part 353 sched. I.

with the Air Force (App. 1-7).[4] During the summer of 1980, the Air Force determined that the project underlying its contract with Lockheed was urgent. As a result, on September 17, 1980, Lockheed gave its purchase order a priority rating and accelerated the delivery date to June 1981 (Pet. App. 2; App. 20).[5] See 15 C.F.R. Part 350, Section 7.

Soon after receiving Lockheed's rated order, petitioner's Sales Office Manager, Eugene Zentz, telephoned OIM. Zentz noted that Modu-Lines were complex, made-to-order machinery that took up to six months to manufacture. He suggested that accelerated delivery of Lockheed's Modu-Line might have an effect on petitioner's unrated commercial orders. Zentz was invited to visit OIM to discuss the effect a June 1981 delivery date would have on petitioner's customers (App. 3-5). On October 3, 1980, Zentz advised OIM by letter that rescheduling Lockheed's order would delay manufacture of several commercial customers' machines by at least five months (*id.* at 9).

After considering petitioner's concerns, OIM on November 6, 1980, telexed a directive to petitioner ordering delivery of Lockheed's Modu-Line by June 30, 1981. On November 12, 1980, petitioner accepted the directive (Pet. App. 4).

Three months later petitioner informed OIM that Rolls Royce, one of its commercial customers, would cancel its order because of the additional delay purportedly caused by

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[4]"App." refers to the documents set out in a separate appendix that we have lodged with the Clerk of this Court and served on counsel for petitioner. These documents were part of the administrative record filed in the Court of Claims.

[5]Petitioner had previously received several other higher rated orders for Modu-Lines to be produced for Chrysler Corporation (Pet. App. 3-4).

the accelerated delivery directive.[6] Petitioner warned OIM that it would look " 'to the government * * * for the reimbursement of all financial loss and damages' " occasioned by the directive (Pet. App. 4). OIM, in a letter dated March 12, 1981, denied that the government was liable for damages and called petitioner's attention to the administrative procedure described in DPS Section 26(a), 15 C.F.R. Part 350 (App. 18).[7]

3. Petitioner filed suit in the Court of Claims seeking to recover $434,596 (Pet. App. 4). It claimed that the directive by OIM was a taking of its property for which the Fifth Amendment required payment of just compensation. Petitioner argued that the government had taken both its contract with Rolls Royce and the Modu-Line delivered to Lockheed. The United States moved for summary judgment, arguing that petitioner had suffered no loss other than consequential damages not compensable under the Fifth Amendment. The government also urged that the petition should be dismissed because petitioner had failed to exhaust its administrative remedies.

The Court of Claims granted the government's motion for summary judgment. The court began by noting: "The plaintiff does not contend that it was unaware when it

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[6]Rolls Royce's order was originally scheduled for delivery in January 1981. As a result of a strike at petitioner's plant, the Rolls Royce order was rescheduled for delivery in September 1981 (Pet. 3). When expedited delivery was directed for Lockheed's machine, the Rolls Royce order was pushed back five more months.

[7]Section 26(a) provides that any person who is issued a directive may submit a request for adjustment if he believes "that such provision works an undue or exceptional hardship upon him not suffered generally by others in the same trade or industry, or that its enforcement against him would not be in the interest of national defense or in the public interest." Section 26(b) (15 C.F.R. Part 350) provides for appeal from an adverse decision on a request for adjustment.

accepted the Lockheed order in 1979 that the government could expedite delivery under the Act" (Pet. App. 3). The court went on to hold that if a taking of the Modu-Line intended for Rolls Royce had occurred, petitioner had received just compensation for the machine itself (*id.* at 5-6). The court also held that petitioner's loss of the expected benefit from its contract with Rolls Royce was not one that warranted just compensation (*id.* at 7-9). Relying on this Court's decision in *Omnia Commercial Co.*, v. *United States*, 261 U.S. 502 (1923), the Court of Claims concluded that "the fifth amendment covers only direct appropriations of private property and not 'consequential loss or injury resulting from lawful governmental action' " (Pet. App. 8, quoting 261 U.S. at 510).

ARGUMENT

1. The issues presented by the petition involve the application of settled law to the facts of this case, and pose no question warranting this Court's review. Petitioner no longer contends—as it did in the Court of Claims—that the accelerated delivery directive was a taking of the Modu-Line itself. Instead, petitioner now argues that "[t]he Directive * * * seized petitioner's * * * investment backed 'production facilities' and expectations, with the damages measured by the lost contract it had with Rolls Royce" (Pet. 6). The government did not, of course, take over petitioner's facilities in any way. In essence all that petitioner claims is that it is entitled to the expected profits from a lost contract.

As the court below correctly concluded, this Court and the Court of Claims have consistently held that the Fifth Amendment does not mandate compensation for lost profits. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871); *Omnia Commercial Co.*, v. *United States, supra*; *Mitchell* v. *United States*, 267 U.S. 341, 345 (1925); *R.J. Widen Co.* v. *United States*, 357 F.2d 988, 994 (Ct. Cl. 1966); *Georgia-Pacific Corp.* v. *United States*, 640 F.2d 328, 361 n.44 (Ct.

Cl. 1980); *T.O.F.C., Inc.* v. *United States*, 683 F.2d 389, 395-396 (Ct. Cl. 1982). See also 4 J. Sackman, *Nichols on Eminent Domain* § 13.33 (3d ed. 1981). In *Mitchell* v. *United States, supra*, 267 U.S. at 345, this Court defined unrecoverable consequential damages as losses that are "an unintended incident" of the actual taking by the government. Similarly, in *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 281-282 (1943), the Court explained:

> There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment. * * * [T]he sovereign must pay only for what it takes, not for opportunities which the owner may lose.

In *Omnia Commercial Co., Inc.* v. *United States, supra*, the claimant had a favorable contract to purchase a large quantity of steel plate from a steel producer at below market value. Before any steel had been delivered to Omnia the government requisitioned the manufacturer's entire production for the year and directed the manufacturer not to comply with the terms of Omnia's contract. Subsequently, Omnia sued the government for just compensation, contending that by requisitioning the steel the government had appropriated for public use Omnia's contractual right to the steel. This Court rejected Omnia's claim. It found that although the government had frustrated performance of a contract favorable to Omnia, there had been no compensable taking. The Court characterized Omnia's frustrated business opportunity as an unrecoverable "consequential loss or injury resulting from lawful governmental action * * *." 261 U.S. at 510.

This case is no different. Rather than requisitioning petitioner's entire production, the government simply directed accelerated delivery of a Modu-Line for which Lockheed had already contracted. Petitioner's loss of the benefit of its contract with Rolls Royce is no less "consequential" than

Omnia's loss—it is simply a frustrated business opportunity resulting from lawful government action. Moreover, contrary to petitioner's contention (Pet. 7-8), it is of little import that in this case the manufacturer, rather than the purchaser, complains that the contract was frustrated. Whether the consequential harm is suffered by one party rather than the other is purely a matter of happenstance, depending on which way shifting market forces have tilted the benefit of the bargain. Had the market price of steel dropped below the contract price in *Omnia*, it would have been the manufacturer rather than the buyer who complained of a "taking"; but the government's action and the nature of the loss would have been the same.

Nor is the decision in this case at odds with *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949). In *Kimball* the Court held that when the government appropriates a claimant's entire business, the Fifth Amendment may require compensation for intangible assets such as going-concern value. That very principle was explicitly acknowledged in *Omnia* itself. 261 U.S. at 513. The difference between *Kimball* and this case is that going-concern value is "not merely a contract in respect of the property taken, but * * * an integral part of it" (*ibid.*).

The decision below is distinguishable from *Kimball* in another, and equally important, respect. As the Court of Claims noted, petitioner "does not contend that it was unaware when it accepted the Lockheed order in 1979 that the government could expedite delivery under the Act" (Pet. App. 3). And as this Court has observed in another context, "businessmen engaged in * * * federally * * * regulated enterprises accept the burdens as well as the benefits of their trade * * *." *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 271 (1973). Unlike the claimant in *Kimball*, whose laundry was condemned for wartime use, petitioner voluntarily entered into a contractual agreement that, pursuant

to the governing statute and regulations, might have to be performed more quickly than originally ordered. In accepting the government's original order petitioner must have foreseen that its production schedule would have to be rearranged if it received a DPS directive.

2. Not only was the loss of petitioner's contract with Rolls Royce not a compensable taking; it also was a result that might have been avoided if petitioner had pursued the administrative remedies available to it. 15 C.F.R. Part 350, Section 26 (Pet. App. 46-47) provides:

> (a) Any person subject to any provision of this regulation may submit a request for adjustment or exception to BDC[8] upon the ground that such provision works an undue or exceptional hardship upon him not suffered generally by others in the same trade or industry, or that its enforcement against him would not be in the interest of the national defense or in the public interest. * * * Each request shall be in writing, by letter in triplicate, addressed as provided in section 27(a) of this regulation, and shall set forth all pertinent facts and the nature of the relief sought, and shall state the justification therefor.
>
> (b) Any person may appeal to the Appeals Board for the Department of Commerce from an adverse decision against him by BDC pursuant to this regulation.

This section was designed to afford an administrative remedy for problems like those that underlie petitioner's claim. Although there is no provision for monetary relief, it is possible to secure an "adjustment or exception" to the

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[8]The Bureau of Domestic Commerce's ("BDC") authority has been assumed by the Office of Industrial Resource Administration.

terms of a directive—such as a change in delivery date—in order to avoid consequential losses.

In this case petitioner was invited by the government to discuss the impact a June 1981 delivery date would have on its commercial orders (App. 5, 10). It also was informed that Section 26(a) provided for formal submission of a request for adjustment or exception (App. 18). Petitioner followed neither of those approaches, nor did it seek review of the directed delivery date from the Appeals Board for the Department of Commerce. Under these circumstances, petitioner is ill situated to complain of a loss that it might have avoided.

3. Petitioner's assertion of the significance of this case for "every manufacturer * * * under [the] Defense Production Act of 1950" (Pet. 10) is belied by its own recognition that "this is a case of first impression" (*id.* at 4). That no similar claim has arisen in the three decades since passage of the Act is in part explained by the settled state of Fifth Amendment law respecting claims for lost contracts. Petitioner's claim is further undermined by 15 C.F.R. Part 350, Section 26, which is designed to avoid the imposition of undue or exceptional hardship on manufacturers affected by directives and rated orders. Those who diligently pursue that remedy may avoid the problems that petitioner has brought upon itself.[9]

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[9]Where implementation of a directive does require the displacement of other commercial orders, 15 C.F.R. Part 350, Section 24 protects the manufacturer against liability to disappointed customers. It provides that "[n]o person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any BDC regulation, order, direction, directive, or other written instruction * * *."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1983

DOJ-1983-03

APPENDIX INDEX

Purchase Order, dated December 21, 1979, from Lockheed-California Company to Kearney & Trecker Corp. ..... App. 1-2

Affidavit of Rodney A. Joseph, Defense Programs Manager, Office of Industrial Resource Administration ..... App. 3-7

Letter dated October 3, 1980, from Kearney & Trecker Corp. to United States Department of Commerce, Priorities and Allocations Divison, and attachment. ..... App. 8-10

Directive from Office of Industrial Mobilization to Kearney & Trecker Corp., dated November 6, 1980. ..... App. 11-12

Telex from Kearney & Trecker Corp. to United States Department of Commerce, Office of Industrial Mobilization, dated November 12, 1980. ..... App. 13

Letter from Kearney & Trecker Corp. to United States Department of Commerce, Office of Industrial Mobilization, dated February 3, 1981. ..... App. 14-15

Letter from Kearney & Trecker Corp. to United States Department of Commerce, Office of Industrial Mobilization, dated February 25, 1981. ..... App. 16-17

Letter from United States Department of Commerce, International Trade Administration, to E.R. Zentz, Sales Office Manager, Kearney & Trecker Corp., dated March 12, 1981. ..... App. 18-19

Purchase Order, dated September 17, 1980, from Lockheed-California Company to Kearney & Trecker Corp. ..... App. 20

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No. 82-1100

In The

Supreme Court of the United States

October Term, 1982

KEARNEY & TRECKER CORPORATION,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

(Formerly the United States Court of Claims)

REPLY BRIEF FOR PETITIONER

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March 18, 1983

COCKLE PRINTING CO., 1211 Douglas St., Omaha 68102

QUESTIONS PRESENTED

Is a partial, temporary taking of control over a manufacturer's facility a taking under the Firth Amendment?

Did the Directive issued to Kearney & Trecker Corporation by the United States Department of Commerce, Office of Industrial Mobilization, to change its production schedule, which change delayed deliveries to customers of Kearney & Trecker Corporation, and which delays resulted in a cancelled order, constitute a compensable partial taking of Kearney & Trecker Corporation's property?

PARTIES

The parties to the proceedings in the United States Court of Claims, the judgment of which is sought to be reviewed, are all listed in the caption of this case in this Court. Kearney & Trecker Corporation is a wholly owned subsidiary of Cross & Trecker Corporation.

TABLE OF CONTENTS

Pages

Questions Presented i

Parties i

Argument 1

Conclusion 8

TABLE OF AUTHORITIES

CASES:

Almeida-Sanchez v. United States, 413 U. S. 266 (1973) 4

Georgia-Pacific Corp. v. United States, 640 F. 2d 328 (Ct. Cl. 1980) 3

Kimball Laundry Co. v. United States, 338 U. S. 1 (1949) 6

Legal Tender Cases, 79 U. S. (12 Wall.) 457 (1871) 2

Mitchell v. United States, 267 U. S. 341 (1925) 3

R. J. Widen Co. v. United States, 357 F. 2d 988 (Ct. Cl. 1966) 3

T. O. F. C. Inc. v. United States, 683 F. 2d 389 (Ct. Cl. 1982) 4, 5

TEXTS:

4 J. Sackman, *Nichols on Eminent Domain* § 13.33 (3d ed. 1981) 5

TABLE OF AUTHORITIES—Continued

Pages

4A J. Sackman, *Nichols on Eminent Domain* § 14.01 (3d ed. 1981) 6

CONSTITUTION:

Fifth Amendment, U. S. Constitution 2, 5, 6

No. 82-1109

In The

Supreme Court of the United States

October Term, 1982

KEARNEY & TRECKER CORPORATION,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

(Formerly the United States Court of Claims)

REPLY BRIEF FOR PETITIONER

ARGUMENT

1. It is clear from the United States' Brief in Opposition to the Petition for Writ of Certiorari of Kearney & Trecker Corporation that the government remains confused about the central issues before this Court. As a result, the government's Brief in Opposition does little to place in focus the important and far-reaching implications of Kearney & Trecker's Petition.

From the outset of this case, the government has sought to defeat Petitioner's claim through an exercise of creative semantic license.

The simple act of labelling Kearney & Trecker's injury as "consequential damage" has, it would appear, enabled the government to press into the battle the "settled law" on the nonrecovery of "consequential damages" in the Fifth Amendment/taking context. The government's reading of the law as "settled" is of course inconsistent with the first words in the opinion of the court below: "In this case of first impression . . .". 688 F. 2d at 781.

The real weakness of the government's position, however, can best be seen by reference to the cases which it cites in its Brief in Opposition, several of which are offered by the government to support its contention that the Fifth Amendment does not mandate compensation for "lost profits".

Although nowhere in its filings with either the Court of Claims or this Court has Petitioner sought compensation for something called "lost profits", a brief analysis of the government's authority for this proposition is useful because it demonstrates the government's lack of understanding of what injury was suffered by Petitioner.

Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1871), actually stand for the proposition that where the sovereign does some act and as an unintended result of that act some person is indirectly injured, no compensation is mandated by the Fifth Amendment. This Court, in *Legal Tender Cases, supra,* offered the example of the sovereign's declaration of war resulting in some later, indirect injury.

Such is clearly not the case here. The government intended to do what it did, and did exactly what it intended to do. It knew the expected result and achieved that result. No speculation, chance or coincidence was involved. In the furtherance of its purposes, the government appropriated to itself Petitioner's right to the control of its production schedule, production facilities, and investment-backed production expectations.

Mitchell v. United States, 267 U.S. 341, 345 (1925), cited by the government, held that damages resulting from a loss or destruction of a business incidental to a taking of land are not recoverable as a part of the compensation for the land taken. Again, the relationship is indirect. Nothing in *Mitchell* speaks to the issue of direct taking exemplified by this case.

R. J. Widen Co. v. United States, 357 F. 2d 988, 994 (Ct. Cl. 1966) is merely a restatement of the familiar principle that the sovereign must pay for what it takes, not what the owner lost. Nothing in *R. J. Widen, supra,* precludes the possibility that what the sovereign takes may in some cases be identical to what the citizen loses. The government has never understood that in this case Petitioner's reasonable profit expectations are merely a convenient measure of the value of the taking for which it seeks compensation.

In *Georgia-Pacific Corp. v. United States,* 640 F. 2d 328, 361 (Ct. Cl. 1980), the plaintiff had been paid the fair market value of a gravel deposit site which had been taken by the United States. Plaintiff alleged that it would then have to pay more for gravel at another site, and sued the government for the probable difference in price. Com-

pensation was properly denied for plaintiff's speculative future losses.

T. O. F. C. Inc. v. United States, 683 F. 2d 389, 395-396 (Ct. Cl. 1982) is wholly inapposite to the present case. In that case compensation was sought by a plaintiff which had management contracts for the operation of apartment buildings which had been taken by, and for which compensation had already been paid by, the government. Again, the alleged injury was clearly indirect or tangential.

In its brief the government reminded this Court that it has, in another context, observed that "businessmen engaged in . . . federally . . . regulated enterprises accept the burdens as well as the benefits of their trade . . .". *Almeida-Sanchez v. United States,* 413 U.S. 266, 271 (1973). How different from this case the context of that search and seizure case actually was can readily be seen by reference to this Court's opinion:

> Two other administrative inspection cases relied upon by the government are equally inapposite . . . [B]oth approved warrantless inspections of commercial enterprises engaged in businesses closely regulated and licensed by the government . . . the Court stressed the long history of federal regulation and taxation of the manufacture and sale of liquor . . . [and] licensed gun dealers. *Id.*

Notwithstanding the irrelevance of *Almedia-Sanchez* to Petitioner's claim for just compensation, the language quoted by the government does serve to help focus again the real question before this Court: Should the injury suffered by or burden placed on Petitioner be shared alone by Petitioner and those similarly situated, or should those

who receive the benefit of defense preparedness—the entire society—share in bearing this burden?

The government has cited 4 J. Sackman, *Nichols on Eminent Domain* § 13.33 (3d ed. 1981) to support its conclusory contention that Petitioner seeks compensation for "lost profits", which are "consequential damages" and therefore not compensable under the Fifth Amendment. The treatise referred to actually contains an excellent discussion of the distinction between compensable and non-compensable takings. According to the author, one primary distinction to be made is whether the taking consisted of a direct appropriation of contract rights, which would be compensable, or merely the frustration of contract resulting from the appropriation of the subject matter (as in *T. O. F. C. v. United States, supra*).

More to the point of this case, the same author had this to say about "consequential damage" in the eminent domain context:

> The term "consequential damage" is ambiguous in character, and is not truly relevant to any discussion respecting the different classes of damage. In the proper sense of the term, all damages must of necessity be consequential, since all damage is the consequence of an injurious act. The use of the term introduces an equivocation which is detrimental to any hope of a clear settlement of the question. It means both damage which is so remote as not to be actionable, and damage which is actionable. Sometimes the term is used to denote damage which, though actionable, does not follow in point of time upon the doing of the act complained of. The term has been characterized as consequential damage to an actionable degree. The distinction seems to be between less and more remote damage, and, in the last analysis, seems

to be purely a matter of degree. 4A J. Sackman, *Nichols on Eminent Domain* § 14.01 (3d ed. 1981).

The government's mere designation of Petitioner's injury as "consequential damages" clearly fails to address the issue in this action.

Notwithstanding the government's reading of *Kimball Laundry Co. v. United States*, 338 U. S. 1 (1949), the holding of that Fifth Amendment case provides considerable assistance to a proper understanding both of Petitioner's injury and a basis for compensation of that injury.

The teaching of *Kimball* was that certain "things", corporeal or incorporeal, have a general demand or value which is potentially transferable from one owner to another. On the other hand, some values are not transferable, such as an owner's unique need for property or idiosyncratic attachment to it.

In *Kimball* this Court said that "value compensable under the Fifth Amendment is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalence," *Id.*, 338 U. S., at 5, and found that Kimball's control of and use of its laundry trade routes had such a transferable value.

So also do Kearney & Trecker's use and control of its production facilities, production schedule and economic expectations have a transferable value. Can anyone doubt that some private concern would have had to pay dearly for the rights the government seized from Petitioner?

The government would have this Court say that the appropriation by the government of Petitioner's right to produce and sell one Modu-line, which is an 18-month proj-

ect, is not a compensable taking. Is the same true with respect to two Modu-lines? One-half of all the Modu-lines Petitioner can produce in a year? All such Modu-lines? All of Petitioner's production? The principle remains the same. The quality of the injury is the same, only the quantity differs.

Is the government required to pay just compensation only when it takes a square mile of land, but not an acre? Would the holding in *Kimball, supra,* have been otherwise if the government had taken only a portion of Kimball's trade routes?

2. The government also contends that Petitioner failed to exhaust its administrative remedies, as it contended in the Court below in support of its motion for summary judgment. Although this contention was not a part of the decision below, it is significant that in support of this position the government itself admits that "there is no provision for monetary relief" in its administrative remedy structure.

This fact of course explains why Petitioner "failed" to exhaust the administrative remedies. Petitioner's injury could only be remedied by monetary relief.

The same fact is yet another consideration which operates in favor of the grant of certiorari in this case: at present no proper redress exists for such takings as the one for which Petitioner seeks just compensation.

3. The final point raised in the government's brief is the contention that since the position of Petitioner has apparently never been advanced before, no hardship must exist for manufacturers such as Petitioner, the case is

therefore not important, and certiorari should therefore be denied. The logic of that theory of constitutional law speaks for itself, and it should be disregarded by this Court.

CONCLUSION

This Court should grant certiorari forthwith, and finally resolve the important constitutional question posed by this case.

Respectfully submitted,

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